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January 11, 2000

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Ms. Sheila Eckman  
Acting Director  
Office of Waste and Chemicals Management  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, Washington 98101

Re: Initial Decision of Dispute of Demand for Stipulated Penalties  
Administrative Order on Consent for Corrective Action ("Order")  
Docket No. 1091-11-20-3008(h)  
Rhone-Poulenc, Inc., Marginal Way Facility  
WAD 00928 2302

Dear Ms. Eckman:

Container Properties, Inc. respectfully requests, under paragraph 16.4 of the Order, that the U.S. Environmental Protection Agency ("EPA") reconsider and vacate its Initial Decision, or in the alternative, that the EPA reconsider and modify its Initial Decision for the reasons set forth below. Container Properties believes that it and its consultants, RCI Environmental and AGI Technologies, have acted in good faith with regard to each submission of the Groundwater Monitoring Plan required by the EPA's January 13, 1999 Scope of Work. In light of this good faith effort and the language of the Order, Container Properties requests that the EPA eliminate or reduce the penalties set forth in the EPA's Initial Decision and the EPA's November 4, 1999 Demand for Stipulated Penalties.

### I. Introduction

The EPA can waive the imposition of all or some of the stipulated penalties under the Order if it determines that the Respondent attempted in good faith to comply with the Order or to timely cure defects in initial submissions. Container Properties describes below what it believes to be the good faith efforts of its consultants to timely submit both an initial draft of the Groundwater Monitoring Plan ("GWMP") EPA requested in January, 1999, and revised drafts to cure the concerns EPA noted on June 16, 1999, and in early August, 1999. The information below will also clarify Container Properties initial appeal of the Demand for Stipulated Penalties on November 19, 1999.

## **II. Calculation of Penalties**

In a letter dated November 19, 1999, Mr. Donald Verfurth, counsel for Container Properties, argued that the EPA should not assess stipulated penalties for the March 22, 1999 submission of the GWMP because that was Container Properties initial submission of the plan to the EPA. In its Initial Decision, the EPA rejected that argument stating that the "[a]ssessment of stipulated penalties in response to a deficient initial submission is certainly appropriate under the terms of the Order." Initial Decision at 3. In another section, however, the Order provides Container Properties an opportunity to submit a revised plan in response to any EPA comments or modifications to an initial submission of a work plan within 30 days, if the EPA's comments are not disputed by Container Properties. Order at ¶ 7.3. Container Properties did not object to the EPA's comments, and submitted, through its consultants, a revised GWMP on July 19, 1999, 30 days from its receipt of EPA's June 16, 1999 comments, as required by paragraph 7.3.<sup>1</sup> Paragraph 7.3 suggests that EPA could not have demanded stipulated penalties if the July 19, 1999 GWMP complied with the EPA's requests.

As demonstrated below, Container Properties and its consultants believe in good faith that the July 19, 1999 GWMP responded to each and every comment from the EPA on June 16, 1999, as well the provisions of the January 13, 1999 Scope of Work. In addition, as demonstrated below the August 20, 1999 GWMP addressed specific EPA comments given orally by Ms. Christy Brown in early August, 1999, most of which were new and not required by the Scope of Work or EPA's June 16, 1999 comments. Therefore, Container Properties requests that the EPA reconsider and vacate its Initial Decision and Demand for Stipulated Penalties.

If, after reviewing the information below, the EPA does not find that the July 19, 1999 submission was a good faith effort on the part of Container Properties and its consultants, then Container Properties suggests that paragraph 7.3 of the Order provides that EPA should begin calculating stipulated penalties on the date of that submission. Paragraph 7.3 allows 30 days for a reply to accepted EPA comments and implies that if the revision is sufficient no stipulated penalties will be imposed. Therefore, since the March 22, 1999 GWMP was Container Properties' initial submission, and Container Properties should be given the benefit of the reply period allowed in paragraph 7.3.

The reply period ended on July 19, 1999, and if EPA still believes that the July 19, 1999 submission was not a good faith effort to comply with EPA's requests, then the calculation of penalties should be begin on that date. If EPA were to calculate penalties from July 19, 1999 to August 20, 1999, under the provisions of paragraph 15.2(b) the total amount of stipulated penalties is \$60,500. Thus, if the EPA still does not believe that the submission of the July 19, 1999 GWMP was a good faith effort to comply with the January 13, 1999 Scope of Work and to

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<sup>1</sup> Container Properties received EPA's June 16, 1999 comments on June 18, 1999 and submitted a revised GWMP on July 19, 1999.

respond to EPA's June 16, 1999 comments, the EPA should reduce its demand for stipulated penalties to \$60,500.

While Container Properties believes the discussion below, the information contained in our letter of November 19, 1999, and all of the good faith efforts of its consultants give EPA ample basis for vacating all of the stipulated penalties, a calculation of stipulated penalties beginning on July 19, 1999, under either of the above formulas would be acceptable to Container Properties, as well as consistent with the Order.

### **III. March 22, 1999 and July 19, 1999 GWMPs**

In our November 19, 1999 letter regarding EPA's demand for stipulated penalties, we concentrated on two areas of concern, the Appendix IX issue and the Investigation Derived Waste ("IDW") issue, because those two areas of confusion persisted even as of the September 29, 1999 EPA approval with modifications letter. Although the discussion of these two areas contained considerably more detail, our letter did not mean to imply that these were EPA's only concerns. Rather, our November 19, 1999 letter argued that since these two areas of concern remained after Container Properties' consultants attempted to address all of EPA's concerns, Container Properties believed they formed a substantial basis for the EPA's demand for penalties. While we set forth additional reasons why EPA should not penalize Container Properties for its March 22, 1999 submission above and in our earlier letter, we take this opportunity to set forth in detail how each provision of the Scope of Work was addressed by the March 22, 1999 GWMP, as well as how those provisions and each of the EPA's June 16, 1999 comments were addressed in the July 19, 1999 GWMP.

We hope this information clarifies our belief that each submission was made in a good faith effort to comply with the EPA's requests. For ease of reference, we have highlighted all instances where we believe the July 19, 1999 GWMP complied with the Scope of Work and EPA's June 16, 1999 Comments.

#### **A. EPA's example of failure to comply with the SOW provides an example of how confused this dispute has become.**

On page 4 of EPA's Initial Decision, under the heading "The Basis for Imposition of Penalties is Respondents' Failure to Comply with Basic Requirements Set Forth in the January 13, 1999 Determination and SOW", the first full paragraph states:

*"The SOW set forth the minimal requirements and the July 19, 1999 submission of the GWMP fell far short of those clear requirements. EPA believes that the documents speak for themselves. For purposes of elucidation, however, one example of a requirement not met by the March 22, 1999 GWMP that was clearly set forth in the Determination and the SOW was the requirement that at least quarterly monitoring "must continue until*

*decisions are made on appropriate Corrective Measures.” This requirement was stated in the Determination. The Determination went on to state that ongoing monitoring may be required throughout the implementation of the Corrective Measure. This is but one basic requirement of the groundwater monitoring that was not contained in the GWMP submitted.”*

Because both the March 22, 1999 GWMP and the July 19, 1999 GWMP are referred to in this paragraph, it is unclear about which GWMP the last sentence in this paragraph refers. The implication of this paragraph seems to be, however, that the July 19, 1999 GWMP did not contain acceptable language concerning the duration of groundwater monitoring. This is not the case. Section 2.2.5, Sampling Schedule, in the July 19, 1999 GWMP states:

*“EPA Region 10 has determined that quarterly groundwater sampling for VOCs, metals, and geochemical indicator parameters is required to meet the objective stated in Section 2.1. Quarterly sampling will continue indefinitely. EPA may approve altering the sampling schedule in the future, provided that adequate data exist to support such a revision. The first round of groundwater sampling will commence within 30 days of EPA’s approval of this revised groundwater monitoring plan. Sampling will follow on a quarterly basis from the date of the initial round.”*

**The text of the July 19, 1999 GWMP states unequivocally that groundwater sampling shall continue on quarterly basis, indefinitely, until EPA modifies the sampling schedule.** Furthermore, much of the language in Section 2.2.5 of the July 19, 1999 GWMP is taken directly from text of the January 12, 1999 SOW (SOW), Item 2:

*“2. Ground water sampling and analysis. The ground water sampling and analysis plan shall be submitted to EPA within sixty (60) calendar days. The ground water sampling and analysis plan shall be implemented within (30) days of EPA’s approval or modification and approval of the work plan, and shall continue on the schedule specified in the approved sampling and analysis plan until such time as this requirement is modified by EPA.”*

**B. An examination of the March 22, 1999 and July 19, 1999 GWMPs shows that each was a good faith effort to be responsive to all elements of the SOW.**

In its Initial Decision, EPA asserts that:

*“The SOW set forth the minimal requirements and the July 19, 1999 submission of the GWMP fell far short of those clear requirements.”*

The following sections list, item-by-item, the ten requirements in the SOW and provide references to: (1) a general description of where those requirements were addressed in the

March 22, 1999 GWMP and (2) specific descriptions of where each SOW item and each of the EPA's June 16, 1999 comments was addressed in the July 19, 1999 GWMP.

***1. The objectives of the sampling and analysis plan must be clearly articulated.***

Sampling and analysis plan objectives were included in Section 2.1 of the March 22, 1999 GWMP. Comments 2 and 9 of EPA's June 16, 1999 letter concerned the objectives. Specifically, EPA Comment 2 provided general guidance regarding to the GWMP objective, and Comment 9 provided specific language with regard to the same. **The groundwater monitoring plan objective in the July 19, 1999 GWMP is stated on Page 7, Section 2.1 and is a direct quote taken from Comment 9 of EPA's June 16, 1999 letter.**

***2. Background.***

Section 1 of the March 22, 1999 GWMP described the project and site background. EPA's June 16, 1999 Comments 3, 4, 5, 6, 7, and 8 pertained to project and site background.

Specifically, EPA's Comments 3 and 4 provided specific language with respect to the order. **These changes were incorporated into Sections 1.0 and 1.1 of the July 19, 1999 GWMP.** Comment 5 asked for specific language to be added referring to the RCRA Part A permit application and the RFA. **These changes were incorporated into Section 1.3 of the July 19, 1999 GWMP.** Comment 6 asked that conclusion of the concurrent Tidal Study be incorporated. **Conclusions of the concurrent Tidal Study were added to Section 1.4.2 of the July 16, 1999 GWMP.** Comment 7 asked that low flow groundwater sampling techniques be adopted, due to metal results from groundwater sampling Rounds 1 and 2. **This change was incorporated into Section 1.5 of the July 19, 1999 GWMP.** Comment 8 asked that a RFI figure showing site investigation areas be added. **This figure was included as Figure 4 of the July 19, 1999 GWMP.**

In summary, the site and project background (SOW Item 2) were clearly discussed in Section 1.0 of the July 19, 1999 GWMP, including:

- Project description, Page 1, Section 1.1
- Facility description, Page 1, Section 1.2
- Facility history, Page 2, Section 1.3
- Geology, Page 2, Section 1.4.1
- Hydrogeology, Pages 2 & 3, Section 1.4.2
- Groundwater sampling history, Pages 3 & 4, Section 1.5
- Contamination overview, Pages 4 & 5, Section 1.6

Container Properties' consultant, AGI, put a great deal of effort into Sections 1.5 and 1.6, and we believe the July 19, 1999 GWMP complied with the requirements of the SOW and was a good faith effort to address EPA's June 16, 1999 comments. Section 1.6 provided what is to

our knowledge the first analysis of Round 5 groundwater data, which, although rejected by EPA because of quality control concerns, provided useful qualitative data about site groundwater conditions.

### ***3. Maps and Figures.***

The March 22, 1999 GWMP contained the figures applicable to groundwater sampling. The July 19, 1999 GWMP responded to Comments 6, 8, and 23 in EPA's June 16, 1999 letter by providing additional figures. **These additional Figures were: Figure 2, Groundwater Monitoring Well Locations; Figure 3, Mean Groundwater Elevation Contour Map, Upper Aquifer (1/31/94 to 2/3/94); Figure 4, RFI Investigation Areas; and Figure 7, Special Sampling Conditions.**

The July 19, 1999 GWMP contained figures that met the requirements of the SOW and EPA's June 16, 1999 comments, including:

- Figure 1, Vicinity Map
- Figure 2, Groundwater Monitoring Well Locations (**Added in Response to EPA Comment 23**)
- Figure 3, Mean Groundwater Elevation Contour Map, Upper Aquifer (1/31/94-2/3/94) (**Added in response to EPA Comment 6**)
- Figure 4, RFI Investigation Areas (**Added in response to EPA Comment 8**)
- Figure 5, Groundwater Sampling Locations
- Figure 6, Project Organization Chart
- Figure 7, Special Sampling Conditions (**Added in response to EPA Comment 23**)

### ***4. Rationale for sample locations, numbers of samples and analytical parameters.***

Rationale for sample locations, numbers of samples, and analytical parameters were contained in Section 2.0 and Tables 1, 2, 3, 4, and 5 of the March 22, 1999 GWMP. Comments 2, 9, 10, 14, 19, 20, 21, and 22 of EPA's June 16, 1999 letter raised issues concerning sample locations, number of samples, and analytical parameters.

Specifically, Comment 2 was a general comment referring to objectionable terminology and overall GWMP objectives. Comment 9 referred back to Comments 1 and 2 and provided specific language for the GWMP objectives (refer to SOW Item 1 above). Comment 10 asked "...to include the standards and criteria used by the Respondents to select an appropriate laboratory." Comment 14 provided specific guidance for LNAPL analysis. Comment 19 asked for quantitation limits for individual PCDD/PCDF congeners. Comment 20 requested that EPA Method 8290 be used for PCDD/PCDF analysis in place of EPA Method 8280. Comment 21 referred to the sampling schedule. Comment 22 listed specific wells for Appendix IX sampling and analysis. **The July 19, 1999 GWMP made a good faith effort to meet the requirements**

of the SOW and address all of EPA's comments referenced above in the June 16, 1999 letter, as follows:

- The rationale for monitoring well selection is discussed on Page 7, Section 2.2.1 and summarized on Table 2. EPA agreed with the rationale for the monitoring well network presented in the March 22, 1999 GWMP. This section was revised to address EPA Comments 2 and 9.
- Analytical methods are discussed on Pages 7 & 8, Section 2.2.2, conforming to the terminology discussed in Comment 2. Specific language addressing Comments 14 and 20 was added to Section 2.2.2. Analytes, analytical methods, method detection limits, and reporting limits are provided on Tables 3 through 9. Specifically, in accordance with Comment 14, Tables 6 and 7 provide LNAPL reporting limits for VOCs and metals. Table 9, in accordance with Comment 19, provides target detection limits for individual PCDD/PCDF congeners. Sample containers, preservatives, and holding times are listed on Table 10.
- Above and beyond the requirements of the SOW and in response to Comment 10, Page 8, Section 2.2.3 presents a detailed description of the laboratory selection criteria and accreditation's.
- Table 6 in the March 22, 1999 GWMP proposed a sampling schedule listing varying wells and parameters for sampling on a quarterly basis. It was deleted from the July 19, 1999 GWMP in accordance with Comment 21.
- Table 2 was modified to include the Appendix IX scan wells listed in Comment 22.

##### ***5. Initial sampling schedule.***

The March 22, 1999 GWMP contained the initial sampling schedule in Section 2 and Table 6. Comments 1, 21, and 22 of the EPA's June 16, 1999 letter refer to the sampling schedule. Specifically, Comment 1 restated EPA's request that all wells selected for analysis be monitored quarterly for geochemical indicator parameters, VOCs, and metals. Comment 21 had the same content as Comment 1 but referred to Table 6. Comment 22 listed wells for Appendix IX scan analysis.

The July 19, 1999 GWMP represented a good faith effort to meet the requirements in the SOW and EPA's June 16, 1999 letter. The sampling schedule was discussed in Sections 2.2.2 (Pages 7 & 8) and 2.2.5 (Page 9). These sections were revised to meet the requirements of Comment 1. Table 6 in the March 22, 1999 GWMP proposed a sampling schedule listing varying wells and parameters for sampling on a quarterly basis. It was deleted from the July 19, 1999 GWMP in accordance with Comment 21. Groundwater monitoring wells

scheduled for sampling were shown on Figure 5 and Table 2. Table 2 lists the wells for Appendix IX scan analysis in accordance with Comment 22. Wells requiring special sampling procedures for tidal influence, LNAPL monitoring and sampling, and groundwater effervescence were shown on Figure 7.

#### ***6. Field methods and procedures.***

Field methods and procedures were discussed in Sections 3.0 and 4.1 of the March 22, 1999 GWMP. Comments 11, 14, 15, 16, and 17 in EPA's June 16, 1999 letter concerned to field methods and procedures. Specifically, Comment 11 provided specific guidance concerning tidal stage sampling and LNAPL monitoring and sampling. Comment 14 provided reference to LNAPL monitoring. Comment 15 discussed special procedures for calibrating the dissolved oxygen meter. Comment 16 listed specific purging stabilization criteria. Comment 17 raised the issue of hazardous waste determination for IDW.

The July 19, 1999 GWMP attempted in good faith to meet the requirements of the SOW and EPA's June 16, 1999 letter. **Field methods and procedures were fully described in Sections 3.0 through 4.1 (Pages 10 to 18). The discussion addressed the following monitoring and sampling considerations:**

- Wells under tidal influence, Page 10, Section 3.1.1 (Entire section added in response to Comment 11)
- Measuring and recording field data, Page 11, Section 3.1.2, and Pages 16 to 18, Section 4.1
- Wells containing LNAPL, Page 10, Section 3.1.2 (Section modified to address Comments 11 and 14)
- Effervescing groundwater, Page 10, Section 3.1.3
- Groundwater purging using low flow techniques, Page 11, Section 3.2.1 (Section modified to address Comments 15 and 16)
- Sample collection using low flow techniques, Page 12, Section 3.2.2
- Sample containers, Page 13, Section 3.3 and Table 10
- Quality control samples, Pages 13 & 14, Section 3.4.
- Equipment decontamination, Page 12, Section 3.2.3
- Sample preservation, Table 10
- Chain of Custody, Pages 17 & 18, Section 4.1.2
- Packing and shipment, Page 18, Section 4.1.3
- Management of investigation derived waste, (IDW) Pages 14 & 15, Section 3.5. (Section added in attempt to respond to Comment 17)

#### ***7. Sample analysis.***

Sample analysis was addressed in Sections 4.0, 6.0, 7.0, and 8.0 of the March 22, 1999 GWMP. Comments 18, 19, and 20, (pertaining to PCDD/PCDF data validation, analysis method, and reporting limits) of EPA's June 16, 1999 letter were the only comments



significantly affecting these sections. All laboratory sample handling and analysis procedures were clearly described in Sections 4.0, 6.0, 7.0, and 8.0 of the July 19, 1999 GWMP as follows:

- Custody procedures, Pages 16 to 19, Section 4.0
- Sample storage and holding times, Table 10
- Analytical procedures, Pages 25 & 26, Section 6.0
- Calibration procedures and frequency, Pages 27 to 32, Section 7.0
- Data reduction, validation, and reporting, Pages 33 to 37, Section 8.0. Section 8.2.3 was modified to address Comment 18 and added specific procedures for the validation of PCDD/PCDF data.
- Table 9 was added to the July 19, 1999 GWMP to address Comments 19 and 20.

#### ***8. Site safety plan.***

A complete site specific Project Health and Safety Plan (HASP) for groundwater sampling was included as Appendix A of both the March 22 and July 19, 1999 GWMP. EPA did not comment on the HASPs included in those plans.

#### ***9. Field and laboratory quality assurance/quality control procedures.***

Field and laboratory quality assurance/quality control procedures were addressed in Sections 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, and 9.0 of the March 22, 1999 GWMP. Comment 15 of EPA's June 16, 1999 letter addressed field calibration of probes for dissolved oxygen. Comment 16 of the June 16 letter addressed monitoring for purge water parameters. Comment 18 of the EPA's June 16, 1999 letter addressed independent data validation of PCDD/PCDFs.

Field QA/QC procedures meeting the requirements of the SOW were an integral part of the July 19, 1999 GWMP, and included the following:

- Groundwater purging and sampling, Pages 11 & 12, Sections 3.2.1 & 3.2.2. Section 3.2.1 was modified to address EPA Comments 15 and 16.
- Sampling equipment decontamination, Pages 12 & 13, Section 3.2.3.
- Quality Control Samples, Pages 13 & 14, Section 3.4.
- Field custody procedures, Pages 16, 17, & 18, Section 4.1.
- AGI field forms, Appendix B.
- Sample shipping, Page 18, Section 4.1.3.
- Field data reduction procedures, Page 33, Section 8.1.1.
- Field quality control check, Page 39, Section 9.1.

Laboratory QA/QC procedures meeting the requirements of the SOW and EPA's June 16, 1999 comments were described in the following sections of the July 19, 1999 GWMP:

- **Laboratory custody procedures, Page 19, Section 4.2**
- **Quality assurance objectives, Pages 20 to 24, Section 5.0.**
- **Analytical procedures, Pages 25 & 26, Section 6.0.**
- **Calibration procedures and frequencies, Pages 27 to 32, Section 7.0.**
- **Laboratory data reduction procedures, Pages 33 & 34, Section 8.1.2.**
- **Data validation, Pages 34 to 37, Section 8.2 As described above, this section was modified to address EPA Comment 18.**
- **Laboratory quality control checks, Pages 39 to 45, Section 9.0.**

#### ***10. Reporting requirements.***

Reporting requirements are described in Section 2.0, 6.0 and 8.0 of the March 22, 1999 GWMP. Comments 12 and 13 of EPA's June 16, 1999 letter refer to reporting requirements. Specifically, Comment 12 specifies that maps and graphical plots will be used to summarize quarterly results and relate data to previous relevant data, and Comment 13 asks for specific language concerning future sampling for Appendix IX constituents based on the results of Round 6 Appendix IX sampling.

**Reporting requirements meeting the requirements of the SOW and EPA's June 16, 1999 letter were described in the following sections of the July 19, 1999 GWMP:**

- **Groundwater monitoring reports will be prepared as outlined on Page 9, Section 2.2.6. This section was modified to address Comments 12 and 13.**
- **Analytical data will be reported using the format discussed on Page 26, Section 6.3.**
- **Field and Laboratory data will be reported as discussed on Page 38, Section 8.3.**

#### **IV. August 20, 1999 GWMP**

**A. The August 20, 1999 GWMP responded in good faith to all of EPA's oral comments on the July 19, 1999 GWMP as received in early August 1999. All modifications requested at that time were, however, beyond the basic elements of the SOW.**

##### ***1. Field sampling information.***

EPA expressed concern that the July 19, 1999 GWMP did not contain enough guidance for the field sampling crews. This was not a requirement of the January 12, 1999 SOW. The August 20, 1999 GWMP addressed this concern in two ways. First, a newly created Table 10 listed all the wells to be sampled, special sampling conditions (groundwater effervescence, LNAPL occurrence, and tidal influence), and identified those to be sampled for the Appendix IX scan parameters. Second, Appendix B included an example of a sampling matrix to be prepared for all samples including quality control samples.

Table 10 summarizes information from other portions of the July 19, 1999 GWMP and contains no new information. While we agree with EPA that Table 10 and the sampling matrix are convenient and helpful, they were not required to address elements of the SOW nor EPA's June 16, 1999 comments.

## ***2. Appendix IX parameters.***

EPA noted that all Appendix IX parameters were not included in the GWMP. Tables 8 and 9 in the August 20, 1999 GWMP list were revised to include all but two (excepting asbestos) of the Appendix IX parameters. These two parameters (Dieldrin and Endosulfan II) are in listed the EPA's September 29, 1999 Approval with Modifications Letter.

As was discussed in our November 19, 1999 letter, it was not until early August 1999, when Alan Carey of AGI spoke with Christy Brown of the EPA, that Mr. Carey and AGI became aware of the fact that the list of target compounds found in Table 2 did not include all of the volatile organic compounds ("VOCs") and metals which were included in Appendix IX of 40 C.F.R Part 264, other than those which were listed in Table 5. When Mr. Carey contacted the laboratory (Multi-Chem) which had provided the target list of VOCs and metals after the August 1999 telephone conversation, he learned, for the first time, that there were several different lists of VOCs in existence. One, EPA SW-846, lists the Appendix IX compounds, plus additional VOCs (108 in all) and describes the methodology which should be employed to analyze the samples. EPA SW-846 also authorizes a laboratory to create its own target compound list. This list of targeted compounds is derived, in part, from the ability of individual laboratories to calibrate their instruments for each compound on the list. It was this later list that Mr. Carey used in the March 22, 1999 and July 16, 1999 GWMPs. The Multi-Chem compound list for VOCs was designed to satisfy the EPA contract laboratory program's target compound list.

It was never Container Properties or AGI intention to not include all Appendix IX compounds, nor were they purposely omitted in the March, July or August GWMP. AGI reliance on ARI to provide a complete list of all Appendix IX compounds in no way represented an attempt to hide data or be unresponsive. Dieldrin and Endosulfan II are on ARI's Target Compound List for EPA Method 8080 and would have been analyzed for and reported, even if they were not included in EPA's September 29, 1999 Approval with Modifications letter.

## ***3. Analytical laboratory substitution.***

EPA's June 16, 1999 Comment 10 stated in part: "Please be aware that any deviations from the final approved Groundwater Monitoring Plan, including selection of another laboratory, would constitute noncompliance unless such deviation is approved in writing in advance." AGI incorporated this comment by revising Section 2.2.3 of the July 19, 1999 GWMP to state that EPA would have to approve of any laboratory substitutions.

EPA expressed concern that the statement in the July 19, 1999 GWMP was not consistent with the wording in the Order on Consent. The August 20, 1999 GWMP was revised to be consistent with paragraph 8.2 of the Order with respect to laboratory substitutions. We believe this modification goes beyond responding to the required elements of the SOW and EPA's June 16, 1999 comments.

***4. Investigation derived waste.***

We agree with EPA's contention in the December 27, 1999 Initial Decision letter that this issue has already been discussed at length. As we have stated before, the text in the March 22, 1999 GWMP conformed to what we understood to be practice for handling IDW at the Facility. The July 19, 1999 GWMP made a good faith effort to respond to EPA's Comment 17 in their June 16, 1999 letter. To the best of our knowledge, Comment 17 changed existing policy for the IDW at the site by adding the U220 hazardous waste listing to all IDW at the site. As we are now aware, the key to resolving the U220 hazardous waste listing issue lies with Byung Maeng of Ecology.

***5. Records retention.***

With regards to records' retention, the July 19, 1999 GWMP stated records would be retained for 6 years. EPA requested that this statement be modified to clearly indicate that the six-year period commences at the termination of the Order. This was an appropriate clarification, but the original wording was in no way meant to subvert the Order. We believe this modification goes beyond responding to the required elements of the SOW and EPA's June 16, 1999 comments.

***6. EPA Method 8260B analyte list.***

Christy Brown, in her oral comments, asked why all 108 compounds listed in the analytic method description of EPA Method 8260 in SW-846 were not being analyzed for this project. Section 2.2.2 of the August 20, 1999 GMWP was therefore expanded to list the reasons that all 108 compounds listed in SW-846 are not included in MultiChem's standard Target Compound List of 65 compounds. We believe this modification goes beyond responding to the required elements of the SOW and EPA's June 16, 1999 comments.

**B. Modifications included with EPA's September 29, 1999 Approval of the August 20, 1999 GWMP are not required by the SOW, nor were they addressed in EPA's previous comments.**

In EPA's Initial Decision, under the heading "The Deficiencies of the GWMP Warranted a Substantial Penalty", EPA states:

*"Respondents appear to believe that EPA's imposition of penalties is based on just two areas of the GWMP: the Appendix IX issue, and the Investigation Derived Waste (IDW) issue. It is unclear to EPA how Respondents came to this belief given the extensive (five pages of 23 comments) submitted to Respondents in EPA's initial disapproval letter, followed by subsequent oral comments provided on the July 19, 1999 GWMP. In fact, even the September 29, 1999 Approval with Modifications still contained five enumerated elements that had yet to be corrected by Respondents in the (August 20, 1999) GWMP despite the provision of the January 13, 1999 Determination and SOW, the June 16, 1999 Disapproval, and the oral comments. These two areas are obviously not the sole basis for the imposition of penalties in this manner."*

EPA's September 29, 1999 approval of the GWMP included 5 modifications as follows:

***1. Sampling schedule.***

This modification was new and had never been discussed by EPA prior to the receipt of EPA's September 29, 1999 letter. The modification adds the words "of commencement" in an attempt to clarify the last sentence of Section 2.2.5 on Page 6.

***2. Groundwater monitoring reports.***

This modification was new and had never been discussed by EPA prior to receipt of EPA's September 29, 1999 letter. The modification adds the words "the commencement of " to the first sentence of Section 2.2.6 on Page 9. The rationale appears to be to clarify the report submittal schedule. However, the schedule already had a stipulated 75-day schedule for report submittal.

***3. Tidally influenced wells.***

This modification is new and had never been discussed by EPA prior to receipt of EPA's September 29, 1999 letter. The modification deals with describing in the report how high and low water levels were determined in response to tidal cycles at the wells to be sampled. This modification does not change the intent, purpose, or the scope of work proposed in the GWMP. The methods by which this would be accomplished would be a standard constituent of any technical report prepared in accordance with the GWMP. We believe this modification goes beyond the required elements of the SOW and EPA's June 16, 1999 comments.

***4. Investigation Derived Wastes.***

Modification 4 dictates the way in which Investigation Derived Wastes (IDW) would be managed and completely removes Section 3.5 and replaces it with new text. In early August telephone calls on this matter, neither EPA nor Ecology gave any indication that they wanted

the July 19, 1999 GWMP text on IDW completely revised. AGI believed, apparently incorrectly, that Section 3.5 of the July 19, 1999 GWMP would be acceptable with modifications.

#### ***5. Appendix IX Table.***

This Modification adds two 2 Appendix IX compounds (Dieldrin and Endosulfan II) to Table 8. As stated previously, Dieldrin and Endosulfan II are on ARI's Target Compound List for EPA Method 8080 and would have been analyzed for and reported in any event.

### **V. Conclusion**

In conclusion, Container Properties believes that the EPA should consider the following issues when reviewing this request for reconsideration.

#### ***1. Container Properties and its consultants are committed to cleanup of the Rhone-Poulenc, Inc., Marginal Way Facility.***

Container Properties developed a concept for beneficial use of the property that makes remediation financially possible and they are committed to cleanup of the site. Therefore, measurable progress on cleanup is occurring for the first time since the Consent Agreement was signed in 1993. AGI has never received any comments or direction from Container Properties or RCIE that would suggest anything other than a firm commitment to work openly and honestly with EPA and make progress on cleanup.

When Container Properties, RCIE, and AGI initially met with EPA about this project, EPA representatives indicated that they were pleased to have a viable beneficial use and would support Container Properties in their efforts. Container Properties efforts support EPA's goals to implement RCRA Cleanup Reforms, a comprehensive effort to address the key impediments to cleanups, maximize program flexibility, and spur progress toward a set of ambitious national cleanup goals.

The demand for stipulated penalties provides a strong negative incentive for the project team. It does nothing to assist EPA in reaching its goals. It can and will interfere with the ability of all parties to work together to accomplish the mutual goal of cleaning up this site. ✓

#### ***2. The March 22, 1999 Draft Groundwater Monitoring Plan represented a good faith effort to provide a viable document.***

The Draft Groundwater Monitoring Plan presented to EPA within two months of EPA's Statement of Work was a much more comprehensive and responsive document than the February 6, 1998 GWMP prepared by Geraghty and Miller for Rhodia in response to EPA's

Scope of Work documents dated August 8, and December 22, 1997. The draft plan covered much more detail than the earlier document and essentially 'fleshed out' the EPA's SOW for the first time. Therefore, it was anticipated and not surprising that EPA would have significant comments.

***3. The July 19, 1999 Groundwater Monitoring Plan represented a good faith effort to respond to all EPA comments provided on June 16, 1999 as well as addressing every element of the SOW.***

On June 16, 1999 EPA provided comments and informed Container Properties that it would calculate stipulated penalties if the Respondents continued to submit documents that fail to address all of EPA's comments. Container Properties and its consultants took EPA's concerns seriously and prepared a document in one month that responded in good faith to all comments provided by EPA. Further, we believe that the July 19, 1999 attempted in good faith to address every element of the SOW. Therefore, Container Properties believed in good faith that they provided a document that addressed all EPA comments.

***4. The August 20, 1999 revised Groundwater Monitoring Plan was a good faith effort to fully address EPA's additional oral comments on the July 19, 1999 plan.***

In early August, EPA representatives contacted RCIE and indicated that they had a few additional comments they would like to have addressed. Container Properties and its consultants worked hard to quickly address these comments. We believe that the August 20, 1999 GWMP addressed in good faith each EPA comment. Therefore, Container Properties believes that it has continued to provide documents that addressed all EPA comments.

***5. The key to implementing mutual remediation goals for the Rhone-Poulenc, Inc., Marginal Way Facility is to establish better communications that build an atmosphere of cooperation and trust.***

Inadequate direct communication has been a significant contributing factor leading to the demand for stipulated penalties. Container Properties and its consultant's lack of clarity on how to produce documents that meet all EPA desires is a result of this inadequate communication. It is not a result of any intent to mislead, obscure facts, or otherwise be unresponsive.

EPA should favorably consider Container Properties request to reconsider and vacate the demand for stipulated penalties considering Container Properties and its consultants have:

1. Demonstrated willingness to clean up the site and improve the environment,
2. Made sincere attempts to provide better documents than prior parties' efforts,
3. Attempted in good faith to incorporate all EPA comments in each submittal, and
4. Attempted in good faith to fully address all elements of the SOW.

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EPA should consider that the imposition of stipulated penalties does nothing to help clean up this site. In actuality, it only makes communications more strained and interferes with the ability of all parties to move forward in a constructive manner.

EPA's favorable consideration of Container Properties' request to reconsider and vacate the stipulated penalties, along with positive steps by all parties to restore communication and trust, will be welcome. Such actions will facilitate our common goal – quick and effective remediation of the Rhone-Poulenc, Inc. Marginal Way Facility.

Very truly yours,

CARNEY BADLEY SMITH & SPELLMAN, P.S.

A handwritten signature in black ink, appearing to read "Donald J. Verfurth".

Donald J. Verfurth

Peter H. Dykstra

cc: Pete Wold, RCI Environmental  
Mackey Smith, AGI Technologies  
Charles Blumenfeld, Perkins Coie  
Byung Maeng, Ecology, NWRO  
Richard Padden, Esq.



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